

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHERON M. BISH

Claimant

V.

AMPCO SYSTEM PARKING

Respondent

AND

**INDEMNITY INS. CO. OF
NORTH AMERICA**

Insurance Carrier

Docket No. 1,071,816

ORDER

STATEMENT OF THE CASE

Claimant requested review of the July 1, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones. Robert R. Lee of Wichita, Kansas, appeared for claimant. Dallas Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant suffered a personal injury by accident on October 16, 2014, which was the prevailing factor causing a medical condition requiring treatment from the date of accident until her medical release on November 21, 2014. The ALJ awarded temporary total disability (TTD) benefits from October 22, 2014, through November 21, 2014. The ALJ determined the accident is not the prevailing factor causing claimant's current medical condition and denied claimant's request for additional medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 30, 2015, Preliminary Hearing and exhibits; the transcript of the December 9, 2014, Preliminary Hearing and exhibits; and the transcript of the January 14, 2015, discovery deposition of claimant, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues there is a causal connection between her work conditions and the accident sustained on October 16, 2014. Claimant contends she sustained an acute tear of her medial meniscus while loading laundry.

Respondent maintains claimant's accident did not arise out of and in the course of her employment because it is not the prevailing factor for her injury, medical condition, and need for treatment either currently or prior to November 21, 2014. Respondent argues the ALJ's Order should be affirmed, excepting that portion awarding TTD benefits from October 22, 2014, to November 21, 2014, which should be reversed.

The issues for the Board's review are:

1. What is the prevailing factor causing claimant's injury and medical condition?
2. Is claimant entitled to TTD benefits beginning October 22, 2014, through November 21, 2014?
3. What is the prevailing factor causing claimant's need for medical treatment?

FINDINGS OF FACT

Claimant began employment with respondent in May 2014 in the housekeeping department. Her position included both housekeeping and laundry, but she worked exclusively in the laundry room during the last four months of her employment. Claimant passed a preemployment physical and performed her duties with no restrictions.

On October 16, 2014, claimant turned while moving laundry and twisted her right knee. Claimant testified she heard a loud pop in her knee and felt immediate searing pain. Claimant indicated the twisting motion caused her knee pain and not the weight of the laundry. Claimant reported the incident to her supervisor and was told to see a doctor.

Claimant went to the Sumner Regional Medical Center emergency room on October 22, 2014. X-rays taken of claimant's right knee revealed "severe multicompartamental hypertrophic/osteoarthritic changes of the right knee."¹ Claimant was referred to her primary care physician, Dr. Joel Weigand, whose office is adjacent to the emergency room. Dr. Weigand prescribed pain medication and recommended claimant be seen by an orthopedist. Claimant testified Dr. Weigand told her the injury was work-related and recommended she seek legal counsel.

Dr. Angela Moore, an osteopathic doctor, first examined claimant on October 27, 2014. Dr. Moore diagnosed a knee sprain and pain and provided restrictions which respondent did not accommodate. Dr. Moore initially indicated claimant sustained a work injury consistent with the physical findings of her examination and provided conservative care. An MRI done on November 19, 2014, showed:

¹ P.H. Trans. (June 30, 2015), Resp. Ex. 1 at 26.

1. Prominent tricompartmental osteoarthritis and spurring.
2. Chronic complete ACL tear.
3. Early medial compartment failure with complex tearing of the medial meniscus, class 3 to 4 chondromalacia and prominent spurs.²

After reviewing the MRI, Dr. Moore wrote that claimant suffered an underlying osteoarthritis and a chronic ACL tear that led to instability of the knee, which ultimately caused an acute medial meniscal tear. Dr. Moore determined claimant had reached maximum medical improvement and released her from care on November 21, 2014. Dr. Moore opined the prevailing factor for claimant's injury was the underlying osteoarthritis and chronic ACL tear.

Orthopedic surgeon Dr. Pat Do examined claimant on February 2, 2015, at the request of the ALJ for independent medical evaluation purposes. Dr. Do reviewed claimant's medical records, history, and performed a physical examination. He recorded the following impressions: "right knee pain with severe degenerative joint disease, chronic ACL tear, chronic medial meniscus tear, down to bone in the medial compartment according to the MRI."³ Dr. Do provided a causation opinion:

Within a reasonable degree of medical probability, her described mechanism of injury of twisting and turning and hearing a pop is not the causative factor for her current need for treatment for her right knee and is not the causative factor any kind a resultant impairment and not the causative factor for her needing any kind of restrictions for her right knee under work injury standpoint.⁴

Orthopedic surgeon Dr. Edward Prostic examined claimant on April 10, 2015, at claimant's counsel's request. Claimant complained of pain, swelling, and popping in her right knee, difficulty with prolonged walking/standing, difficulty using stairs, squatting, and kneeling, and some numbness in the right leg. After reviewing claimant's medical records, history, conducting x-rays and performing a physical examination, Dr. Prostic concluded claimant sustained an acute tear of the medial meniscus. He wrote:

[Claimant] is reporting injury to her right knee during the course of her employment, October 16, 2014. She has been found to have torn medial meniscus and significant degeneration of her knee. Assuming that her history is correct that she had no right knee symptoms prior to the twisting injury at work, she sustained an acute tear of the medial meniscus. As she has significant degenerative changes on x-ray, any procedure less than total knee replacement arthroplasty is unlikely to be beneficial. The injury sustained on or about October 16, 2014 is judged to be the

² *Id.* at 6.

³ P.H. Trans. (June 30, 2015), Resp. Ex. 2 at 2.

⁴ *Id.*

prevailing factor in causing the injury, the medical condition, and the need for medical treatment.⁵

Claimant has not worked since October 22, 2014. She testified she continues to have pain in her right knee, with numbness and shooting pains throughout her right leg.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2014 Supp. 44-508(f) states, in part:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

...

(2)(B) An injury by accident shall be deemed to arise out of employment only if:

⁵ P.H. Trans. (June 30, 2015), Cl. Ex. 1 at 2-3.

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2014 Supp. 44-508(g) states:

“Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. In determining what constitutes the “prevailing factor” in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2014 Supp. 44-510c(b)(2)(A) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.

K.S.A. 2014 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁷

ANALYSIS

1. What is the prevailing factor causing claimant's injury and medical condition?

The ALJ found claimant suffered a personal injury by accident on October 16, 2014, which was the prevailing factor causing a medical condition requiring treatment from the date of accident until her medical release on November 21, 2014. The undersigned agrees. Claimant described a pop in her knee and immediate searing pain while twisting in the course of her work with respondent.

In her initial notes, Dr. Moore wrote that claimant suffered a work injury consistent with the physical finding. Dr. Moore, after reviewing the MRI, wrote that claimant suffered an underlying osteoarthritis and a chronic ACL tear that led to instability of the knee, which ultimately caused an acute medial meniscal tear. *Taber's Cyclopedic Medical Dictionary* defines the term "acute" as: "1. Sharp, severe; Having rapid onset, severe symptoms, and a short course; not chronic."⁸ The Harvard Medical School's *Dictionary of Medical Terms* defines acute as "[a] condition that comes on suddenly, often with severe, but short-lived symptoms."⁹ The only event in the record that could explain the acute meniscal injury is the accident described by claimant.

Dr. Prostig opined claimant sustained an acute tear of the medial meniscus in her right knee as a result of her work-related accident, which is consistent with Dr. Moore's finding of an acute meniscal tear. Only Dr. Do identified the meniscal tear as chronic. The weight of the evidence supports a finding that claimant suffered a medial meniscus tear as a result of her work-related accident.

2. Is claimant entitled to TTD benefits beginning October 22, 2014, through November 21, 2014?

The ALJ did not exceed his jurisdiction in ordering the payment of TTD benefits from October 22, 2014, through November 21, 2014. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation, and the payment of temporary disability compensation. The Board can review only those issues listed in K.S.A. 44-534a(a)(2). Those issues are: (1) whether the

⁷ K.S.A. 2014 Supp. 44-555c(j).

⁸ *Taber's Cyclopedic Medical Dictionary*, 17th Ed. at 36.

⁹ <http://www.health.harvard.edu/a-through-c>.

employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.¹⁰ The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.¹¹ The Board lacks jurisdiction to review this issue.

3. What is the prevailing factor causing claimant's need for medical treatment?

The ALJ determined the accident is not the prevailing factor causing claimant's current medical condition and denied claimant's request for additional medical treatment. The undersigned agrees. Claimant needs a total knee replacement. Dr. Prostic wrote any treatment short of a knee replacement will not be beneficial. Dr. Moore opined claimant's current knee problems are related to osteoarthritis and a chronic ALJ tear, not the work-related accident. Dr. Do wrote the work-related accident was not the causative factor for her current need for treatment. Based upon the evidence in the record, claimant has failed to prove her current need for medical treatment is related to her October 16, 2014, work-related accident.

CONCLUSION

Claimant sustained a medial meniscus tear as a result of her work-related accident. The Board does not have jurisdiction to review the TTD issue. Claimant failed to prove her need for ongoing medical treatment is related to her work-related accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Gary K. Jones dated July 1, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

¹⁰ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

¹¹ K.S.A. 2014 Supp. 44-551(l)(2)(A).

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Gary K. Jones, Administrative Law Judge